

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
2002 Biennial Regulatory Review –) MB Docket No. 02-277
Review of the Commission’s Broadcast)
Ownership Rules and Other Rules)
Adopted Pursuant to Section 202 of the)
Telecommunications Act of 1996)

To: The Commission

COMMENTS

Entravision Holdings, LLC (“Entravision”), licensee of 16 full-service UHF television stations, by its attorneys hereby responds to the Commission’s solicitation of comments on the UHF discount in light of recent legislation¹ affecting the national television ownership cap. *See Public Notice*, DA 04-320, released February 19, 2004. In support thereof, Entravision states as follows.

The Commission’s instant request for comments is linked, as an initial matter, to its decision in June 2003 to raise the national television ownership limit from 35 percent to 45 percent. *See In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13814-47 (2003) (“*Report and Order*”). In response to that decision, Congress passed legislation overriding the Commission’s new ownership cap. Pursuant to the 2004 Appropriations Act, Congress amended Section 202(c) of

¹ Consolidated Appropriations Act, 2004, Pub.L.No. 108-199 (the “2004 Appropriations Act”).

the Telecommunications Act of 1996 and directed the Commission to modify the national television ownership cap to 39 percent.

The Commission now seeks comment on the fact that Congress, in modifying the Commission's new ownership cap in the 2004 Appropriations Act, did not alter the Commission's treatment of the UHF discount. In the *Report and Order*, in addition to raising the ownership cap, the Commission decided to retain the UHF discount, under which only 50 percent of the television households in a Designated Market Area ("DMA") are attributed to a licensee's national ownership percentage in connection with the UHF stations owned by the licensee. *See Report and Order* at 13845-13847. The Commission determined that the coverage disparity between VHF and UHF stations caused by deficiencies in over-the-air reception for UHF stations still persists, despite carriage of some UHF stations² on multichannel video programming service delivery systems ("MVPDs"). *See id.* In addition to diminished signal coverage, the Commission also noted the higher costs associated with operation of UHF stations, the role of the UHF discount in building new networks, and the lack of use of the UHF discount by the broadcast networks to effect greater national reach through ownership of local stations as reasons not to dispose of the UHF discount. *See id.* Accordingly, the Commission concluded that the UHF discount continued to serve the public interest and should be retained. *See id.*

Entravision now submits that by not overturning or otherwise addressing the UHF discount in the 2004 Appropriations Act, Congress signaled its approval of the Commission's

² The signal coverage deficiencies associated with UHF stations limit UHF stations' ability to obtain carriage on MVPDs. UHF stations remain at a disadvantage to VHF stations insofar as a station's carriage rights are largely determined in accordance with the Grade B signal contour of the station, and UHF stations have inferior Grade B contours as compared to VHF stations. *See* 47 C.F.R. § 76.59(b)(2). Grade B coverage generally has been held to demonstrate a station's service to cable communities and to reflect a station's natural geographic market. *See First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2977 (2001).

retention of the UHF discount as provided for in the *Report and Order*. As a policy matter, the UHF discount is inseparable from the national television ownership cap. The UHF discount does not stand alone as an independent policy goal or tool; rather, it is a feature of the ownership cap itself. Hence, Congress's action vis-à-vis the ownership cap encompasses the UHF discount. In other words, Congress's positive action with regard to the ownership cap must be seen to include the decision on the part Congress not to modify the UHF discount. The fact that Congress did not alter the UHF discount as it was modifying the national ownership limit constitutes "positive inaction," and should be seen, in the context of Congress's ownership cap decision, as ratification of FCC's position on the UHF discount. *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("Congress, by its positive inaction...has clearly evinced a desire not to disapprove [specific judicial decisions] legislatively.")

While under most circumstances, Congressional inaction is not construed as reliable evidence of the intent of Congress, "where the matter has been subject to subsequent congressional attention then congressional acquiescence may be considered among other relevant factors." *See Hohri v. United States*, 782 F.2d 227, 239, n. 26 (D.C. Cir. 1986) (citing *Aaron v. SEC*, 446 U.S. 680, 694 n. 11 (1980) (quoting *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983))). This is such an instance. The ownership limit and the UHF discount were both subjects of close congressional attention. Along with the ownership cap, the UHF discount was debated in Committee before the Congress and in the media. *See e.g., Media Ownership Rules: Hearing of the Senate Commerce, Science, and Transportation Comm.*, 108th Cong. (June 4, 2003) (statements of Senator Sununu, Commissioner Adelstein and Chairman Powell); Edmund Sanders, *Senators Target More FCC Media Rules*, L.A. Times, June 27, 2003, at C3. At one time, the Senate had under consideration proposals to dispose of the UHF discount in

connection with modification of the television ownership cap. *See e.g., Senators Target More FCC Media Rules, supra.* Thus, the UHF discount was given serious consideration in both chambers of the Congress.

Given the Congressional and public scrutiny that attended the Commission's ownership rules, the fact that Congress did not modify the UHF discount when it altered the national television ownership cap can in no way be attributed to oversight or inattention. In this case, then, Congress's ultimate decision to modify the ownership cap without modifying or removing the UHF discount signals Congress's ratification of the UHF discount. Given the inseparability of the UHF discount from the national ownership limit, and in light of Congress's implied decision not to alter the UHF discount in enacting the 2004 Appropriations Act, the Commission's decision to retain the UHF discount, as set forth in the *Report and Order*, should not be modified.

WHEREFORE, for the foregoing reasons, Entravision Holdings, LLC respectfully requests that the Commission retain the UHF discount.

Respectfully submitted,

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